



Lexmark International, Inc.
740 West New Circle Road
Lexington, Kentucky 40550
USA

August 26, 2005

Mr. Fareed Ferhut
Integrated Waste Management Specialist
Buy Recycled Section
CIWMB
1001 I Street
Sacramento, CA 95812

Dear Mr. Ferhut,

Lexmark appreciates being afforded the opportunity to further participate in the California Integrated Waste Management Board's (the "Board") rule-making process with respect to the proposed EPP standard for printer and duplication cartridges. The draft proposal dated August 8 and the comments submitted by other industry participants made it clear to Lexmark that consensus has not been reached on key points, and in certain areas the new draft is even more problematic than the first draft. In fact, the proposed draft inexplicably seeks to exclude legitimate business methods for the collection, recycling, and re-use of empty cartridges by industry participants.

I. Tier 1 Definition

The widespread collection (for re-use and recycling) of printer and duplication cartridges purchased by the state should be the EPP standard's objective. As presently proposed, Tier 1 of the EPP standard would have an opposite effect because it purports to disallow a key means through which some large toner cartridge remanufacturers (including Lexmark) collect empties – return for recycling agreements. Accordingly, Tier 1 should simply be eliminated. Return for recycling agreements are a common means to obtain a steady stream of good quality, empty cartridges for their cartridge remanufacturing programs. Although particular programs differ, a return for recycling agreement generally involves an agreed upon cartridge price (in Lexmark's case, a discounted price versus Lexmark's regular cartridge) in exchange for the customer's agreement to return the empty cartridge only to the seller for remanufacturing or recycling. In Lexmark's experience, using an agreement like this makes it *more likely* that a given cartridge will be reused or recycled – furthering the goals of this EPP standard. Before it began this program, Lexmark's U.S. toner cartridge return for remanufacturing or recycling rate was less than 15 percent. Since implementation, that rate has grown to the point at which about half the empties are returned. In addition, if a seller wants to employ legal design features or manufacturing processes in the cartridge to enforce that agreement, it stands to reason that such features should not exclude the cartridge from EPP treatment.

As Lexmark pointed out in its June 27 comment, the proposed Tier 1 definition is additionally problematic because it contradicts those provisions of the California Public Contract Code (Section 12156) that expressly allow return for recycling agreements. It appears this deficiency was either misunderstood or disregarded, because the August 8 draft failed to correctly model Section 12156.

A review of Public Contracts Code Section 12156 (quoted below in relevant part) reveals the Tier contradiction:

Section 12156:

- (a) Except as provided in subdivision (b), no state agency shall purchase any printer or duplication cartridge for which the manufacturer, wholesaler, distributor, retailer, or remanufacturer places restrictions on the recycling or remanufacturing of that cartridge by any other person.

. . .

- (b) Notwithstanding subdivision (a), a manufacturer, wholesaler, distributor, retailer, or remanufacturer who establishes a recycling or remanufacturing program that is available to its customers may enter into signed agreements with those customers consenting to the return of the used cartridge to the manufacturer, wholesaler, distributor, retailer, or remanufacturer, only for either of the following purposes:
 - (1) Recycling and remanufacturing, for purposes of making the remanufactured cartridge available for purchase.
 - (2) Recycling.

The current Tier 1 proposal contradicts Section 12156 because it only adopts part (a) of Section 12156 (which limits restrictions against remanufacturing or recycling in state government purchases) and ignores part (b) of Section 12156 (which expressly permits cartridge sellers to enter signed return for remanufacturing or recycling agreements).

To Lexmark's knowledge, no industry participant places restrictions on the recycling of toner cartridges by other persons, except as part of a return for remanufacturing or recycling program. The net effect of implementing Tier 1 would be to remove pro-environmental, return for recycling agreements from the EPP equation.

The August 8, 2005 Tier 1 proposal took an additional step backward by purporting to regulate the product design and manufacturing processes. Presumably, the language was added in response to certain inaccurate comments¹ concerning the use of return for recycling agreement enforcement technology and its viability under the European WEEE directive. The reality is that despite intense lobbying from the third party remanufacturing community, the Members of the European Parliament, in crafting the definition of Waste Electrical and Electronic Equipment, excluded printer cartridges that are not present in a printer at the time the printer is discarded. That exclusion from the definition of WEEE accordingly places no limitation on return for recycling agreement enforcement technology under the directive. As we state earlier in this comment: If a cartridge seller and customer agree on a particular return for recycling method for the cartridge, then no valid reason exists to exclude a cartridge from EPP treatment simply because it contains technology that will enforce that agreement.

¹ The detractors against return for recycling agreements routinely argue the agreements are anti-competitive. The Board should be aware that that position has been rejected by U.S. federal judges -- including one for the United States District Court for the Northern District of California -- who ruled Lexmark's toner cartridge Return Program was fair and legal under California law. We attach for the Board's convenience a copy of that opinion.

The design and manufacturing exclusions from the currently proposed Tier 1 also make inappropriate value judgments that contradict the widely recognized solid waste hierarchy of Reduce, Reuse, and Recycle. The solid waste hierarchy embraces all three concepts. Yet the proposed Tier 1 definition forces Reuse to the exclusion of Recycling. Does the Board expect that a single use, biodegradable cartridge should be excluded from EPP treatment? Under the currently proposed Tier 1 definition, the cartridge would not qualify. While perhaps extreme, the example makes the point that there is no telling where technology will go. The proposed definition inappropriately hamstrings pro-environmental innovation.

II. Other Definitions

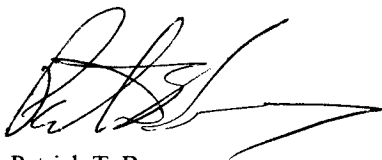
As submitted in its prior comment, Lexmark believes the definitions presently contained in the Code at Section 12200 for secondary and post-consumer material are appropriate. Tiers 2-4, standing alone, are suitable to formulate an EPP standard, and the Tier 1 portion should be eliminated.

III. Proposed Scope of the Standard

Lexmark agrees with those industry participants who propose excluding inkjet cartridges from the EPP scope. Inkjet cartridges are not purchased on state contract. As it is believed that inkjet cartridges are acquired primarily at the micropurchase level, adherence to a standard that includes inkjet cartridges would likely be spotty at best, and any enforcement would prove administratively burdensome.

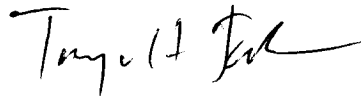
IV. Conclusion

Given its conceptual deficiencies, Tier 1 should be eliminated, and the EPP standard should be limited to the remaining Tiers.



Patrick T. Brewer
Director, Government Affairs

Yours sincerely,



Tonya Jackson,
Director, Sustainable Practices –
Environmental, Health and Safety

cc: Gene Erbin, Neilson, Merksamer, Parrinello, Mueller & Naylor